Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

October Term, 1995

STEVEN M. KRAMER, *pro se*,

Petitioner,

v.

LAURENCE H. TRIBE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the Second, Fifth, Ninth and Tenth Circuits conflict with the Third, and Seventh Circuits on whether the filing of a non-frivolous complaint can form the basis of a sanctions order, should this Court resolve the issue?

PARTIES TO THE PROCEEDING

Steven Kramer

Laurence Tribe

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Kramer respectfully prays that a writ of certiorari be issued to review the judgment of the U.S. Court of Appeals for the Third Circuit entered on March 11, 1995 and the denial of the petition for rehearing on April 14, 1995.

OPINIONS BELOW

The opinion of the court of appeals is found at App. (1a-3a). The opinion of the district court is found at App. (1a-41a) and is reported at F. Supp. (DNJ1994).

JURISDICTION

The judgment of the court of appeals was entered on April 14,1995. App.(1a-3a) . The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTORY PROVISION INVOLVED

Rule 11. Signing of Pleadings, Motions, and Other Papers: Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. BACKGROUND

On May 1, 1992 petitioner obtained a $61.5 million verdict for his client, the plaintiff, in Lightning Lube, Inc. v. Witco Corp. , 87-3243(DNJ). Petitioner, shortly before the verdict had begun discussing with the respondent the possibility of retaining the respondent to handle the post-trial and appellate work. Those discussions continued after the verdict and resulted in an agreement in early June, 1992 signed by Lightning Lube, Inc. petitioner and respondent. A key provision of the agreement was that respondent was to master the extensive record in time to file the post-trial motions in late June 1992 and to personally conduct the oral argument before the Court of Appeals.

A few days after Clinton won the election, respondent's associate contacted petitioner and advised that respondent was being considered for a position on the Supreme Court or Solicitor General and that he therefore may not be able to complete the work under agreement.

B. THE PROCEEDINGS BELOW

Respondent refused to reduce his fee demand. Suit was filed. The district court dismissed the suit in May 1994 on the grounds that petitioner was not a party to the agreement that he had signed. On July ,1994, the district court granted respondent's motion for sanctions, holding that petitioner's comment about the negative Publicity that the complaint would cause was an improper purpose. The district court imposed over $70,000. in sanctions and referred the matter to the U. S. Attorneys in New York and New Jersey and to the Chief Judge for the District of New Jersey on the grounds that the comment constituted extortion.

Lightning Lube filed suit against respondent alleging among other things that the $2.75 million sought by respondent was unconscionable, that respondent had commit numerous breaches of the agreement, including failing to conduct the entire oral argument in the. Third Circuit and failing to master the trial record, as well as participating in a $650,000. prejudgment interest miscalculation. The matter was submitted to binding arbitration on a confidential basis.

The Third Circuit, in March of this year, affirmed the decision without opinion and on April 14 denied petitioner's motion for rehearing en banc. This petition followed.

REASONS WHY PETITION SHOULD BE GRANTED

1. AN ATTORNEY WHO HAS MULTIPLE MOTIVES FOR FILING A NON FRIVOLOUS COMPLAINT IS NOT ACTING IMPROPERLY BECAUSE RULE 11 AS AMENDED IN 1983 MAKES MOTIVE IRRELEVANT:

The U.S.. Court of Appeals for the Second Circuit on June 2,1995 in *Sussman v. Bank of Israel*, 94-7437,(47a-92a) reversed the imposition of sanctions against an attorney who had filed a non frivolous complaint but who was said to have threatened the defendant with negative publicity if it did not settle. Judge Kearse noted that motive under such circumstances is irrelevant because the 1983 amendment to Rule 11 removed the subjective intent test and replaced it with an objective test. Quoting from Judge Schwarzer's article, *A Closer Look*, 104 F.R.D. 181, 195 (1985):

> "Thus, the court is not to `delve into the attorney's subjective intent' in filing the paper...
>
> "`Were a court to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling

> advocacy...If a reasonably clear legal justification can be shown for the filing of the paper in question no improper purpose can be found and sanctions are inappropriate.' "

The Ninth Circuit used similar reasoning in Townsend v Holman Consulting Corp.,929 F2d 1358, 1362(1990) in reversing the imposition of sanctions that had been based on the attorney's alleged improper purpose:

> "I[t] would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure.
>
> ..."[A] determination of improper purpose must be supported by a determination of frivolousness when a complaint is at issue."

2. IT IS NOT AN IMPROPER PURPOSE TO WARN A DEFENDANT OF NEGATIVE PUBLICITY THAT A COMPLAINT WILL CAUSE

The Second Circuit in Sussman held that:

Finally, we turn to the question of whether the finding that there was an improper purpose was correct. The district court held that the fling of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measure are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for speaking to the press, have serious First Amendment implications. Mere warnings by a party of its intentions to assert nonfrivolous claims, with predictions of those claims' likely public reception, are not improper.

In the case at bar, the lower courts did precisely the opposite. It imposed sanctions for just that reason:

B. Steven M. Kramer's Sanctionable Conduct

Defendants are essentially arguing that Kramer filed this law suit to extort a share of Appellate Counsels' fee and to embarrass the Defendants, specifically Laurence Tribe. Defendants claim that Kramer launched a campaign against Tribe by sending copies of his Complaint to newspapers, law journals and other publications, while concomitantly distributing copies to members of the legal community, and that this campaign was designed to force Appellate Counsel to reduce their requested fee. A review of the chronology of event is appropriate to determine whether Kramer's actions are indicative of an improper and

sanctionable motive.

Shortly after the November 12, 1993 oral argument on the post-judgment applications for release of the judgment proceeds in Lightning Lube, Inc. v. Witco Corp., 802 F. Supp. 1180 (D.N.J. 1992), affd 4 F 3d 1153 (3d Cir. 1993), including the 2.75 million in fees to which Appellate Counsel asserts they are entitled, Kramer telephoned Ira Karasick, Esq., and threatened lawsuits and unfavorable publicity for Tribe, Chesebro and Massey, if they did not settle with Lightning Lube for a fee in the $600,000.00 range. ..... Kramer did not, at that time, have any authority to negotiate on behalf of Lightning Lube. .....

On November 24, 1993, Kramer faxed Mr. Karasik a "courtesy copy" of the first Complaint in this action, naming only Laurence Tribe as a defendant.....
3). In separate telephone calls on December 16, 1993, Kramer told Mr. Karasick and Michael Stein, Esq., also counsel for Appellate Counsel, that he would "go to the press and ruin Mr. Tribe's reputation, and provide damaging information about Professor Tribe to Senator Hatch," if Appellate Counsel failed to accept a substantially reduced fee. .....

This Court should decide which circuits are correct. Should a court delve into the motives of an attorney for filing a non frivolous complaint? What if the attorney has multiple motives? Must the "bad" motive be stronger than the "good" motive?

Should a court be permitted to undertake that weighing process on the basis of conflicting affdavits as was done below?

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5304 & 94-5504

STEVEN M. KRAMER

v.

LAURENCE TRIBE;
HARVARD LAW SCHOOL;
JONATHAN MASSEY;
KENNETH CHESEBRO;
IRA KARASICK

STEVEN KRAMER
Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 93-cv-05361
(Honorable William G. Bassler)

Argued March 10, 1995
Before: BECKER, SCIRICA and WOOD*, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the orders of dismissal and related orders dated May 11, 1994 (See A-214-5), and the orders imposing sanctions, including the original order and the order denying motion for reconsideration, and all related orders dated July 14, 1994 , and August 11, 1994, and the order denying recusal dated November 4, 1994, be and are hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

_____

Circuit Judge

Attest:

_____

P. Douglas Sisk, Clerk

Mar 20 1995

Costs taxed in favor or Tribe, Chesebro and Massey as follows:

Appellees' Appendix..... $163.20
Appellees' Brief..... $126.00
Total Costs..... $289.20

Certified as a true copy and issued in lieu of a formal mandate on April 24, 1995.
Teste:
Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

_____

*The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Judicial Circuit, sitting by designation.

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STEVEN M. KRAMER, :

Plaintiff, : Civil Action No. 93-5361 (WGB)

:

v. OPINION

:

LAWRENCE H. TRIBE, HARVARD LAW SCHOOL, JONATHAN : MASSEY, KENNETH CHESEBRO and IRA KARASICK : APPEARANCES :

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BASSLER, DISTRICT JUDGE:

This matter comes before the Court on the motion of Defendants, Laurence H. Tribe, Esq., Jonathan S. Massey, Esq., and Kenneth J. Chesebro, Esq., former appellate counsel for Lightning Lube, Inc. (collectively referred to as "Appellate Counsel"), for sanctions against the Plaintiff, Steven M. Kramer, Esq., former trial counsel for Lightning Lube, Inc. ("Lightning Lube"), pursuant to Federal Rule of Civil Procedure 11, 28 U.S.C. Sec.1927 and the Court's inherent authority to supervise and monitor the conduct of attorneys admitted to practice. The Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec.1332. For the following reasons, the Court will grant Defendants' motion.

I. BACKGROUND

In 1987, Plaintiff, Steven M. Kramer, Esq., was retained by Ralph Venuto, the principal of Lightning Lube, as trial counsel in the matter of *Lightning Lube, Inc. v. Witco Corp. et al.*, 802 F. Supp. 1180 (D.N.J. 1992) *aff'd* 4 F.3d 1153 (3d Cir. 1993). In April of 1991, Kramer met Defendant Laurence Tribe in connection with the unrelated case of *Finenan v. Armstrong World Industries, Inc.*, 774 F. Supp. 225 (D.N.J. 1991), *rev'd in part*, 980 F.2d 171 (3d Cir. 1992), *cert. denied* 113 S. Ct. 1285 (1993). (Second Amended Complaint ("Compl."), Par. 3).

Kramer litigated a three-month jury trial in *Lightning Lube v. Witco* before this Court in the spring of 1992, resulting

in a May 4, 1992 jury verdict in favor of Lightning Lube and against the Witco Corporation ("Witco") for approximately $11.5 million in compensatory damages and $50 million in punitive damages. *Lightning Lube v. Witco*, 4 F.3d at 1161.(1)

On June 23, 1992, Lightning Lube entered into an "Agreement of Representation" (the "Agreement") with Defendant, Laurence H. Tribe, to which Kramer alleged in this action he was a third party beneficiary. (Compl., Par. 5). The Agreement was signed by Ralph Venuto, on behalf of Lightning Lube, Steven Kramer, Esq., and Laurence Tribe. (Compl., Ex. 1).

In response to Witco's post-trial motion for a judgment as a matter of law and a new trial in *Lightning Lube v. Witco*, this Court issued an Opinion and Order on September 2, 1992, granting the motion in part, and reducing Lightning Lube's recovery to $11.5 million. *Lightning Lube v. Witco*, 802 F. Supp. at 1203. Witco had also moved for a new trial based upon Kramer's witness tampering. This Court denied that motion, finding that, although Kramer had improperly approached witnesses, Witco failed to establish sufficient prejudice arising from Kramer,'s actions to warrant a new trial. *Id.* at 1201.

In September 10, 1993, the United States Court of Appeals for the Third Circuit filed an Opinion and Order affirming this Court's September 2, 1992 Judgment Order in its

1. Venuto and Lightning Lube subsequently sued Witco's counsel for malicious prosecution. This court dismissed the Complaint in an unpublished Opinion. The Third Circuit affirmed this court's ruling in *Venuto v. Carella, Byrne, Bain, Gilfillan, Cecchi & Stewart*, 11 F.3d 385 (3d Cir. 1993).

entirety. *Lightning Lube v. Witco*, 4 F.3d 1153 (3d Cir. 1993). On October 8, 1993, upon application to this Court for an Order granting it leave to do so, Witco deposited the sum of $11,547,542.79 in the Court Registry, pursuant to Federal Rule of Civil Procedure 67, Local Rule 35 and 28 U.S.C. Sec. 2041.

Shortly after the money was deposited, numerous applications laying claim to the judgment proceeds were filed with this Court. Among those claims were Lightning Lube's motion for withdrawal of the entire amount, Kramer's claim for his disputed fee of $2,330,031.01, and the disputed claim for appellate counsel fees of Laurence H. Tribe, Esq., Jonathan S. Massey, Esq., and Kenneth J. Chesebro, Esq., in the amount of $2.75 million.(2)

In the midst of the debate over the distribution of the judgment proceeds, on December 2, 1993, Kramer served a copy of his initial Complaint in this action, naming only Laurence Tribe, as a defendant. In January of 1994, Kramer added Massey, Chesebro, Ira Karasick and Harvard Law School. On March 29, 1994, in response to a motion for Rule 11 sanctions made on behalf of Appellate Counsel, Kramer filed his "Second Amended

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2. The judgment proceeds were ultimately distributed by this Court's opinion and Distribution Order of January 27, 1994. The only amount remaining in the Court Registry is the $2.75 million claimed by Tribe, Massey and Chesebro. After numerous problems regarding the forum in which Appellate Counsel's fee dispute was to be decided, this Court issued an oral opinion on June 13, 1994, and an Order, to which the parties consented, on June 14, 1994, memorializing the parties' agreement to have the matter submitted to binding arbitration before a mutually agreed upon neutral arbitrator. The $2.75 million will remain in the Court Registry until the resolution of that arbitration.

Complaint" (the "Complaint"), which deleted Ira Karasick as a defendant.(3)

The Seven Count Complaint against Tribe, Chesebro, Massey and Harvard University, alleged: (1) Breach of Contract; against only defendants Tribe and Harvard Law School; (2) Fraud, against all of the named defendants; (3) Breach of Fiduciary Duty, against all of the named defendants; (4) Breach of Implied Covenant of Gocd Faith and Fair Dealing, against all of the named defendants; (5) Slander, against all of the named defendants; (6) Tortious Interference with Contract, against all of the named defendants; and (3) Negligence, against Harvard Law School.

In the early Spring of 1994, the parties submitted a number of motions with regard to Kramer's action against Appellate Counsel and Harvard Law School, including motions to dismiss, filed on behalf of both Appellate Counsel and Harvard, and Appellate Counsel's Motion for Sanctions against Kramer. By Opinion and Order of May 10, 1994, this Court granted both Harvard Law School's and Appellate Counsels' motions to dismiss

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3. In response to Kramer's letter of March 4, 1994, and Michael S. Stein's responding letter of March 7, 1994, regarding Defendants' Motion for Sanctions, this Court entered a Letter Order on March 16, 1994. The effect of this Order was to allow Kramer 21 days within which he could withdraw or correct the submissions on which Defendants based their Motion for Sanctions under Federal Rule of Civil Procedure 11, as amended and made effective December 1, 1993. In response to the Court's Order, Kramer submitted a document to the court entitled "Second Amended Complaint." This complaint differs from Kramer's Amended Complaint only in that it deletes Ira Karasick as a defendant. The Court interpreted Kramer's Second Amended Complaint as a response to its March 16, 1994 Order and as a Notice of Dismissal of Kramer's complaint against Ira Karasick. (May 10, 1994 Opinion & Order).

on the merits, and reserved decision on Appellate Counsel's Motion for Sanctions pending receipt of supplemental materials requested at oral argument.

Defendants have since submitted the following supplemental materials: (1) "Certification of Mark D. Schorr In Support of Application For Attorney's Fees"; (2) "Certification of Kenneth J. Chesebro, Esq."; (3) Affidavit of Jonathan S. Massey, Esq.";(4) "Affidavit of Laurence H. Tribe"; (5) "Certification of Ira Karasick"; and (6) a Letter Reply to Kramer's objection to the supplemental materials submitted by Defendants. Kramer submitted a Letter Opposition on May 16, 1994. Having received the supplemental materials requested at oral argument, the Court can now address Appellate Counsel's Motion for Sanctions.

II. DISCUSSION

A. Appellate Counsel's Motion for Sanctions

Defendants filed this Motion for Sanctions against Plaintiff, Steven M. Kramer, arguing that Kramer's self- proclaimed reason for filing this suit was to coerce the defendants into settlement regarding their fees in the Lightning Lube v. Witco matter. Kramer's settlement with Venuto and Lightning Lube in his own fee dispute included an agreement that Kramer would receive 25% of any amount by which Kramer could reduce Appellate Counsels' fees from $2.75 million. The means by which Kramer anticipated effecting this reduction was apparently

the filing of this action. Defendants argue that Kramer's entire action was frivolous and was filed both in bad faith and for an improper purpose.

In this sanction motion Defendants seek the following relief:

> (1) outright, immediate dismissal of this lawsuit, with prejudice;
>
> (2) an order requiring Kramer to pay all expenses and attorney's fees incurred by defendants due to the filing of his complaint pursuant to Rule 11 and 28 U.S.C. Sec. 1927;
>
> (3) an order requiring Kramer to pay a sanction of $537,500 -- that is, a sum equivalent to the profit Kramer expected to gain if he succeeded with his extortionate strategy -- into the Court registry pursuant to F.R.C.P. 11(c)(2);
>
> (4) a referral to the Chief Judge of this Court and to the appropriate disciplinary authorities in all other jurisdictions (both federal and state; in which Kramer is a member of the bar for disciplinary proceedings pursuant to Local Rule 7 of the Federal District Court of New Jersey;
>
> (5) a referral to law enforcement authorities for New York and New Jersey, both state and federal, including the U.S. Attorney for the Southern District of New York and the U.S. Attorney for the District of New Jersey, for investigation into

possible violations of 18 U.S.C. Sec.951(a), and New Jersey Code of Criminal Justice 2C:5-1 and 2C:20-5, and other state and federal criminal laws; and

(6) further relief as deemed appropriate by this Court. (Defs.' R. 11 Br., at 2-3). Defendants seek sanctions against Steven Kramer under Federal Rule of Civil Procedure 11, 28 U.S.C. Sec. 1927 and the Court's inherent power to supervise and monitor the conduct of attorneys admitted to practice.

1. Federal Rule of Civil Procedure 11

Federal Rule of Civil Procedure 11 "imposes on counsel a duty to look before leaping and may be seen as a litigation version of the familiar railroad crossing admonition to 'stop, look, and listen.'" *Lieb v. Topstore Indus. Inc.*, 788 F.2d 151, 157 (3d Cir, 1986). When deciding whether to impose sanctions under Rule 11, a district court must evaluate the reasonableness of the signer's conduct at the time the pleading, motion, or other paper was submitted. *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551 (3d Cir. 1999), *cert. denied*, 493 U.S. 1046 (1990).

The Third Circuit recognized in *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) that the primary purpose of Rule 11 is to deter abuses of the legal system. Although a court may not impose a sanction that is punitive or that might drive an attorney out of practice, *id.*, the sanction imposed should be "'the minimum that will serve to adequately deter the undesired behavior.'" *Id.* at 196 (quoting *Eastway Construction Corp. v. City of New York*, 637 F. Supp. 558, 565 (E.D.N.Y. 1986), *order modified*, 821 F.2d 121 (2d Cir. 1987), cert. denied. 484 U.S. 918 (1987)).

In *Lieb*, 778 F.2d at 158, the Third circuit emphasized the discretion of the district court in tailoring an appropriate sanction:

> influenced by the particular facts of a case the court may decide that the circumstances warrant imposition of only part of the adversary's expenses or perhaps only a

of this discretion:

> the district court retains broad discretion in determining the "appropriate" may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances. Whatever the ultimate sanction imposed, the district court should utilize the sanction that further the purposes of Rule 11 and is the least severe sanction adequate to such purpose.

The recently amended Rule 11 incorporates these holdings and provides as follows:

> (b) Representations to Court. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increases in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions state below, impose an appropriate sanction upon the attorneys ... that have violated subdivision (b) ....

(2) Nature of sanction; Limitations. A sanction imposed for a violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated .... [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Fed. R. Civ. P. 11.

The Committee Noted on the revision of Rule 11

recognize that "the court has available a variety of possible sanctions to impose for violations, such as ... referring the matter to disciplinary authorities." Fed. R. Civ. P, 11 Committee Notes, 146 F.R.D. 583, 587 (1993).

As already noted by the Third Circuit, a district court has authority to dismiss an action "for reasons of deterrence and punishment." *Lightning Lube v. Witco*, 4 F.3d at 1179, n. 15

(citing *Guyer v. Beard*, 907 F.2d 1424, 1429 (3d Cir. 1990) (under our jurisprudence district court may dismiss cases where party or counsel has "engaged in contumacious conduct" and where "the ends of justice would [not] be better served by a lesser sanction"); *TeleVideo Systems, Inc. v. Keidenthal*, 826 F.2d 915, 917 (9th Cir. 1987) ("[c]ourts have inherent equitable powers to dismiss actions or enter default judgments for failure to prosecute, contempt of court, or abusive litigation practices"); and *Shea v. Donohoe Const. Co.*, 795 F.2d 1071, 1077 (D.C.Cir. 1986 (district court may dismiss case to "sanction conduct that is disrespectful to the court and to deter similar misconduct in the future" even absent showing of prejudice to other party)).

The applicable case law and the language of Rule 11, gives this Court the authority to impose all of the sanctions requested by Appellate Counsel, should the Court find that Kramer acted in violation of the proscriptions contained in the Rule.

2. Title 28 U.S.C. Sec. 1927

As Steven Kramer is both party and attorney in this action, it is also appropriate for the court to consider the elements of 28 U.S.C. Sec. 1927, briefly mentioned in defendants' requested relief. (Defs.' Br. at 2). Defendants apparently seeks attorneys fees and excess costs from Kramer under 28 U.S.C. Sec. 1927. Section 1927 provides in its entirety:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case

> unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C, Sec. 1927.

The Supreme court stated in *Christianburg Garment Co. v. E.E.O.C.*, 434. U.S. 412 (1978) that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to Lingate after it clearly became so." *Id.* at 422. The fact that a plaintiff ultimately loses his case is not sufficient justification for an award of attorney's fees. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

As noted in this Court's May 10, 1994 Opinion and Order, Kramer's Complaint is meritless. Title 28 U.S.C. Sec. 1927, therefore, specifically authorizes the Court to impose costs and award attorneys fees.

3. The Court's Inherent Disciplinary Authority The Court also has inherent disciplinary authority to supervise and monitor the conduct of attorneys admitted to practice. *Chambers v. Nasco. Inc.*, 501 U.S. 32, 47-46 (1991). "While this power `ought to be exercised with great caution,' it is nevertheless incidental to all courts.'" *Id.*, at 43.

Local Rule 7(E) codifies the courts' traditional authority over attorneys admitted to practice, and provides that:

> [w]hen misconduct or allegations of misconduct which, if substantiated, would warrant discipline of an attorney, shall come

> to the attention of a Judge of this court, and the applicable procedure is not otherwise mandated by these Rules, that Judge shall refer the matter in writing to the Chief Judge.

Local Rule 7(E)(2). Defendants have requested that this Court refer this matter to the Chief Judge as well as to law enforcement and disciplinary authorities. Local Rule 7(E)(2) requires this Court to perform that duty if it becomes aware of misconduct on the part of a practicing attorney.

All of the relief requested by the Defendants is, therefore, within the Court's power under the standards articulated above. The Court reviews Kramer's conduct in light of these standards in order to determine: (1) whether his actions are sanctionable; and (2) if so, the appropriate sanction to be imposed.

B. Steven M. Kramer's Sanctionable Conduct

Defendants are essentially arguing that Kramer filed this law suit to extort a share of Appellate Counsels' fee and to embarrass the Defendants, specifically Laurence Tribe. Defendants claim that Kramer launched a campaign against Tribe by sendng copies of his Complaint to newspapers, law journals and other publications, while concomitantly distributing copies to members of the legal comnunity, and that this campaign was designed to force Appellate Counsel to reduce their requested fee. A review of the chronology of events is appropriate to

determine whether Kramer's actions are indicative of an improper and sanctionable motive.

Shortly after the November 12, 1993 oral argument on the post-judgment applications for release of the judgment proceeds in *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992), *aff'd* 4 F.3d 1157 (3d Cir, 1993), including the $2.75 million in fees to which Appellate Counsel asserts they are entitled, Kramer telephoned Ira Karasick, Esq., and threatened lawsuits and unfavorable publicity for Tribe, Chesebro and Massey, if they did not settle with Lightning Lube for a fee in the $600,000.00 range. (Karasick Cert. (1\10\94), Par. 4). Kramer did not, at that time, have any authority to negotiate on behalf of Lightning Lube. (Stein Cert. (1\10\94), Par. 3).

On Novenber 24, 1993, Kramer faxed Mr. Karasick a "courtesy copy" of the first Complaint in this action, naming only Laurence Tribe as a defendant. (Karasick Cert. (1\10\94), Par.3). In separate telephone calls on December 16, 1993, Kramer told Mr. Karasick and Michael Stein, Esq., also counsel for Appellate Counsel, that he would "go to the press and ruin Mr. Tribe's reputation, and provide damaging information about Professor Tribe to Senator Hatch," if Appellate Counsel failed to accept a substantially reduced fee. (Karasick Cert. Par. 4; Stein Cert. (1\10\94), Par. 2).

On December 22, 1993, Kramer called Karasick and threatened to add Kenneth Chesebro and Jonathan Massey as defendants in the action against Tribe if Appellate counsel did

not accept a settlement in the $600,000.00 range. (Karasick Cert. (1\10\94), Par. 5). During this telephone conversation, Kramer also stated that "he and Ralph Venuto 'agreed' that [Karasick's] clients were wholly responsible for the loss of $650,000 prejudgment interest." (*Id.*)

On December 28, 1993, Kramer faxed to Jonathan Massey a notice to depose Ralph Venuto under the caption "*Steven M. Kramer v. Laurence Tribe, Jonathan Massey, and Kenneth Chesebro*, Civil Action No. 93-5361 (WGB)." (*Id.*) At that time, there had been no such action filed with the Court.

In December of 1993, Kramer contacted the Court numerous times to request release of his fee, then being held in the Court Registry, claiming that he had settled with Lightning Lube and Ralph Venuto. Ira Karasick, Esq., on behalf of Appellate Counsel, objected to the proposed distribution of any of the judgment proceeds in the Court Registry.[4] On or about December 30, 1993, Kramer and Ralph Venuto entered into a settlement agreement in the action of *Lightning Lube v. Kramer*, Civ. Action No. 93-3878(JHR) which had been consolidated with *Kramer v. Lightning Lube*, 93-5021(WGB) before the Honorable

4. Mr. Karasick had filed a letter objection with the court on December 6, 1993, arguing that none of the money in the Court registry should be released until after Appellate counsel were paid, since the terms of the agreement of representation between Tribe and Venuto stated that all other claims were subordinant to Appellate Counsel's fee.

Joseph H. Rodriguez, U.S.D.J., in the United States District Court for the District of New Jersey, in the Camden vicinage.(5)

The agreement between Kramer and Venuto promises Kramer 25% of any amount of money by which he can reduce Appellate Counsel's fee from the requested $2.75 million. For example, if Kramer can compel Appellate Counsel to settle with Lightning Lube for $1.75 million, then Kramer would be entitled to $250,000.00 under his settlement agreement with Venuto.

On January 4, 1994, Kramer faxed Ira Karasick a draft of an Amended Complaint, in which Jonathan Massey, Kenneth Chesebro and Harvard Law School were added as defendants.(Karasack Cert.1\10\94), Par. 7). Kramer followed the facsimile transmission with a telephone call in which he told Karasick "that he would drop everything that he was doing and sue [Karasick] if [he] did not immediately call the Court and withdraw [his] objection to the release of Mr. Kramer's fee." (*Id.*, Par. 8). On January 6, 1994, Kramer faxed Mr. Karasick a revised First Amended Complaint, adding Ira Karasick as a defendant. This revised Amended Complaint was filed with the Office of the Clerk on January 11, 1994.

On January 21, 1994, Appellate Counsel and Ira Karasick served a motion to dismiss the Complaint pursuant to Local Rule

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5. The stipulations of dismissal disposing of both *Kramer v. Lightning Lube*, Civ. Action No. 93-5021 (WGB) and *Lightning Lube v. Kramer*, Civ. Action No. 97-3878 (JHR), were filed with the Clerk's Office in the United States District court for the District of New Jersey, in the Camden vicinage, on January 5, 1994.

12N. Appellate Counsel also filed a Motion for Sanctions with the Court. In response to the Motion for Sanctions and an Order from this Court, Ira Karasick was eventually dropped as a defendant. Because of delays caused primarily by Kramer, Appellate Counsel's motions were not heard by the Court until April 25, 1994.

Between Appellate Counsel's service of the Motion to Dismiss and the date of the oral argument, Kramer began litigating this case in the press, sending copies of his Complaint to newspapers and journals, including student-run newspapers at Harvard. Kramer engineered front-page stories in the February 11, 1994 editions of the Harvard Crimson and the Harvard Law Record, entitled: "Tribe Sued for Fraud, Slander, Negligence," and "Tribe, HLS Facing $5 Million Lawsuit," respectively. Karasick Cert. (2\25\94)1 Ex. 3). Articles related to this litigation also appeared in the Wall Street Journal and the New Jersey Law Journal, among others.

Appellate Counsel and their attorneys have also received inquires from an American Lawyer reporter and a law professor from the University of Minnesota, who had received copies of Kramer's Complaint. There is no way to be certain exactly how many publications, reporters and members of the legal community Kramer has contacted. The Court is confident, however, that not all of his actions in this matter have yet come to light,

Kramer has never contested these underlying facts. In his submission entitled "Reply of Steven M. Kramer in Support of striking Tribe's Sanction Motion and for Costs," Kramer stated:

> In his opposition Tribe states that Mr. Kramer "does not dispute our description of his actions and motives, .. in fact any of our central points." (Opposition, p.2). This statement is ludicrous. Tribe's baseless attacks on Mr. Kramer are so absurd that they do not warrant a dignified response.These ad hominem attacks on Mr. Kramer only bespeak the intellectual poverty of Tribe's legal arguments and are an insult to this Court, for it suggests that this Court would be distracted by such an unprofessional argument. That Mr. Kramer's central focus in filing the complaint was the bona fide exercise of his legal rights is indisputable.

(Kramer's Reply, at 2). Contrary to Kramer's conclusory argument, Defendants' assertion that their "description of Kramer's actions and motives is undisputed," does "warrant a dignified response." Kramer has failed or refused to provide any response to Appellate Counsel's substantiated recitation of the facts, let alone a dignified one. The Court, therefore, finds the factual summary set forth above to be a true and accurate representation of Kramer's conduct in this matter and will judge his actions accordingly

C. Steven M. Kramer's History of Improper Conduct

Defendants forcefully argue that Kramer's more than 36 publicly reported instances of violating rules of professional conduct should weigh in favor of sanctioning him in this instance. (Defs' Br. at 12-20 citing *e.g.*.- *Kingsepp v. Wesleyan*

University, 142 F.R.D. 597, 600-602 (S.D.N.Y. 1992); *Fineman v. Armstrong World Industries. Inc.*, 774 F. Supp. at 275; *In the Matter of Steven M, Kramer*, 193 A.D.2d 222, 602 N.Y.S.2d 871 (N.Y.A.D. 1t Dept., 1993); *In the matter of Steven M. Kramer*, 130 N.J. 536, 617 A. 2d 663 (1993) and *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180, 1201 n. 10 (D.N.J. 1992), *aff'd* 4 F.3d 1153, 1179 n. 15 (3d Cir. 1993)).

As discussed, both the case law interpreting Rule 11 and the amendments make clear that the purpose of sanctions is to deter future violations, and that sanctions should not be more severe than those necessary to deter repeated violations of the rule. See Fed. R. Civ. P. 11(c)(2); *Doering*, 857 F.2d at 194-96. It is, therefore, appropriate to consider past conduct in determining both whether sanctions should be imposed and the nature of any sanctions to be imposed.

With what the Court can only conclude was a significant investment of time and resources, Defendants assembled an appendix containing a history of Kramer's career in published and unpublished cases, beginning with the year he was admitted to the Bar. (See "Appendix in Support of Defendants' Motion for Sanctions," A-1 through A-36). This history is summarized below:

(1) In *Giordano v. Witzer*, 558 F. Supp. 1261, 1262 (E.D. Pa. 1983), the plaintiff who was represented by Kramer, had his Complaint dismissed. Chief Judge Luongo opined that: "The pleadings in this case are, to say the least, frightful. In excess of one hundred pages of exhibits are appended to the

amended complaint. Included in this morass of paper are the agreement of sale for Seller's assets and the supporting documentation." *Id.* at 1262. The court concluded that the agreement clearly demonstrated the parties' desire to litigate any disputes over the agreement in the Court of Common Pleas for Delaware County, rather than a federal district court, and dismissed the amended complaint accordingly.

(2) In *International Mining Co. v. Allen & Co.*, 567 F. Supp. 777, 789-90 (S.D.N.Y. 1987), Judge Sweet dismissed International Mining Company's ("IMCO's"), Complaint under Federal Rule of Civil Procedure 37(b)(2)(C), for failure to respond to discovery. Kramer was IMCO's counsel. In mailing his ruling, Judge Sweet stated that:

> IMCO's complete failure to produce documents, after representation of its counsel in open court that production was forthcoming, can only be described as willful and shows its disrespect not only for its discovery obligations, but also for this court. Its intransigence in supplying adequate answers to Allen's interrogatories rises at least to the level of gross negligence.
>
> Id. at 789. (A-2)..

(3) In *LeMaster v. Bull*, 581 F. Supp. 1170, 1173 E.D. Pa. 1984), the Honorable Louis H. Pollack, U.S.D.J., assessed attorney's fees under 15 U.S.C. Sec. 77k against defendants represented by Kramer, "due to the clear lack of merit and frivolous nature of the defenses raised." (A-3).

(4) In *Rubin v. Buckman*, 727 F.2d 71, 72 (3d Cir.1984), the Third Circuit vacated the district court's order, but

affirmed it finding that "plaintiff or his attorneys [Kramer among them] had either intentionally deceived the court, 'so as to be in a position to nullify any adverse judgment,' or had been reckless, and in either event had committed 'a flagrant violation' of Fed. R.Civ.P. 11." (A-4).

(5) In *Caplan v.Fairchild Publications Corp.*, 13 Media L. Rep. 1571, 1573 (E.D. Pa. 1986), *aff'd* 815 F.2d.693 and 694 (3d Cir. 1987), the district court dismissed plaintiff's complaint in accordance with Federal Rule of Civil Procedure 37(b), finding that "the record establishes willful disobedience and bad faith on the part of plaintiff and his counsel," in providing discovery and failing to abide by the court's orders. The Court further found that "the imposition of attorney's fees incurred by defendant is not an effective deterrent," as that sanction had twice been imposed "with no apparent effect." *Id.* (A-5).

(6) In *Pearline Gregory v.Saks & Co.*, 1986 WL 10666, No. 85-1853, slip. op. (E.D. Pa. Sept. 25, 1986), the district court criticized Kramer for accusing defendants' witnesses of perjury in his summation, advising him at a sidebar colloquy with counsel, that "this is not the way we try a case in federal court." (A-6).

(7) In *In re E.F. Hutton Banking Practices Litigation*, 663 F. Supp. 133, 125 (S.D.N.Y. 1987), the court dismissed a fraud\RICO complaint filed by Kramer, given "the absence of any

colorable allegation of misrepresentation, omission or receptive conduct of any kind." (A-7).

(8) In *Silverman v. Weil*, 662 F. Supp. 1195, 1201 & n.14 (D.D.C. 1987) *aff'd without opinion*, 839 F.2d 824 (D.C. Cir. 1988), the court dismissed another fraud\RICO complaint filed by Kramer after he had "been given four opportunities to draft an adequate complaint" and had repeatedly "made gross and misleading misrepresentations in various pleadings and statements to this Court." (A-8).

(9) In *Seiffert v. Green*, 1987 WL 16670, Civ. No. 81-1956, slip. op. (E.D. Pa. Dec. 8, 1987) the court both assessed attorney's fees and costs against Kramer and limited his client's proof at trial as sanctions for Kramer's "noncompliance with discovery requests and this court's Order." (A-9).

(10) Also in *Seiffert v. Green*, 1988 WL 2068, Civ. No. 81-1956, slip. op. (E.D. Pa. Jan 13, 1988), the court noted that a fee application submitted by Kramer made statements "directly contradictory" to those he made in open court, concerning whether he had written a 20-page brief, and finding it "utterly incomprehensible" that it took Kramer 4.8 hours to prepare a "scratched out and pasted up brief" of 8 pages drawn from a boiler plate motion in another case. (A-10).

(11) In *Klavinsky v. Wolk*, 1988 WL 84748, Civ. No. 86- 4820, slip. op. (E.D. Pa. Aug. 11, 1988), *aff'd without opinion*, 869 F.2d 589 (3d Cir. 1989), the court stated that Kramer's "failure to comply with orders and rules of this court,"

including his failure to attend a scheduled court appearance or offer any explanation for his absence, would fully justify (imposing sanctions on him, but declined to impose sanctions given absence of proof that bis client acquiesced in the wrongdoing.

(2) In *Flip Side Productions v. Jam Productions*, 843 F.2d 1024, 1036-37 (7th Cir.) cert. denied 488 U.S. 909 (1988), the Seventh Circuit affirmed an award of $42,496.25 in attorney's fees against Kramer's client, Flip Side, because at the conclusion of discovery, Flip Side failed to dismiss Tempo as a defendant even though it should have been clear that it had no evidence of any anti-trust violation. (A-12).

(13) In *Astron v. Nationwide Lending Co.*, Inc., 1989 WL 35414, Civ. No. 87-4729, slip. op, (E.D. Pa. Apr. 10, 1989), the district court denied Kramer's motion for a new trial on the grounds that it lacked "even a semblance of merit." (A-13).

(14) In *Getaway Travel. Inc. v. City of Philadelphia*, 1989 WL 24859, Civ. No. 88-3126, slip. op. (E.D. Pa. Mar. 15, 1989) the district court dismissed an anti-trust action in which the court found that Kramer's client could not possibly succeed, where Kramer had asserted state law claims having "no basis in law. "

(15) In *Gray v. Home Shopping Network, Inc.*, 1989 WL 52439, Civ. No. 88-5159, slip. op. (E.D. Pa. May 17, 1989), the district court granted summary judgment against the plaintiff, represented by Kramer, because he offered only hearsay evidence

in opposition to the motion. The court noted that "it is at least questionable whether the claim for punitive damages could have been made in good faith." (A-15).

(16) In *Matthews v. Freedman*, 128 F.R.D. 194, 202-04 (E.D. Pa. 1989), *aff'd sub. nom., Appeal of Kramer*, 919 F.2d 135 (3d Cir. 1990), the district court reprimanded Kramer and ordered him to pay $91404.53 in attorneys' fees for advancing "frivolous legal assertions." The court also referred the matter to the disciplinary review board of the Supreme Court of Pennsylvania for whatever action they deemed appropriate. In imposing sanctions and reprimanding Kramer, Judge Gawthrop stated that "[r]eview of public court orders and opinions reveals that attorney Kramer, individually or jointly with his clients, has been sanctioned on numerous occasions for violations of the Federal Rules, including Rule 11," (citations omitted).

(17) In *Matthews v. Freedman*, 892 F.2d 83 3rd Cir. 1989), the Third Circuit fined Kramer $250.00 for refusing to concede an appeal in light of a Supreme Court decision "patently dispositive of the issues." The Third Circuit stated further that "[t]he absence of a specified appellate rule comparable to Fed.R.Civ.P. 11 does not give counsel the privilege to file a frivolous appeal or maintain one after subsequent and binding precedent demonstrates that the appeal no longer has merit," and warned Kramer that it would "not hesitate to apply sanctions in a sequential manner" against him in the future. (A-17).

(18) In *Schwartz v. Hosp. of the Univ. of Pennsylvania*, 1989 WL 64286, Civ. No. 88-4865 (E.D.Pa. June 12, 1989), the district court awarded the defendants attorneys' fees and costs based upon a finding that Kramer and his client had both "acted in bad faith" in attempting to renege on a settlement agreement . (A-18) .

(19) Again in the matter of *Schwartz v. Hosp. of the Univ. of Pennsylvania*, 1989 WL 80322, Civ. No. 88-4865 (E.D.Pa. July 18, 1989), the district court stated that "[t]he plaintiffs, along with Kramer, have unreasonably increased the cost of litigation in this matter." (A-19).

(20) In *Cellar Door Productions. Inc, v. Kay*, 897 F.2d 1375, 1379 & n. 3 (6th Cir.) *cert. denied* 498 U.S. 819 (1990), the Sixth Circuit affirmed an award of attorneys' fees and costs for the failure of plaintiff's counsel, Kramer, to disclose the related prior action "in violation of the rules of this Court and the clear directives of the [filing] form." (A-20).

(21) In *Lighting Lube, Inc v. Witco Corp.*, Civ. No. 87-3243, slip op., 9-11 (D.N.J. May 4, 1990), the Honorable Jerome B. Simandle, U.S.M.J. (now District Judge Simandle), sanctioned Kramer for obtaining "proprietary and confidential" information from Witco that he was under court order not to disclose, and then "violat[ing] the court's protective order" by leaking it to the press. Kramer was ordered to pay Witco's attorneys' fees and costs because of his "harassing misuse of discovery." The court noted that Kramer's actions were

apparently "calculated to harass and harm Witco, with the hope of possibly coercing favorable settlement from Witco, based upon the prominent disclosure of confidential information," and that he had ignored explicit warnings from his adversaries to avoid such conduct. (A-21).

(22) For a third time in the matter of *Shwartz v. Hosp. of the Univ. or Pennsylvania*, 1990 WL 198750, Civ. No. 88-4865 (E.D, Pa. Nov. 30, 1990), Kramer's clients were sanctioned and prohibited from introducing designated matters into evidence after repeated failures to respond to discovery. (A-22).

(23) In a matter emerging from *Flip Side Productions v. Jam Productions*, 1991 WL 61467, Civ. No. 82 C 3684 (N.D.I11.Apr. 16, 1991), after Kramer's former clients, Flip Side, brought an action against him to pay in excess of $90,000.00 in Rule 11 sanctions for a frivolous RICO/antitrust suit, Kramer moved to disqualify Flip Side's new attorney on the grounds that he supposedly represented Kramer as well. In denying the motion, the district court noted that the baseless motion was "somewhat bizarre" and "at best disingenuous." (A-23).

(24) In the district court's decision on the merits of Flip Side's action against Kramer in *Flip Side Productions v. Jam Productions*, 1991 WL 277617, Civ. No. 82 C 3684 (N.D. I11. Dec. 20, 1991), it found in Flip Side's favor and against Kramer, "as it is and always has been clear that Kramer was the principal architect of plaintiff's misguided efforts" to continue to pursue frivolous litigation. (A-24).

(25) In *Fineman v. Armstrong World Industries, Inc.*, 774 F. Supp. 266, 269, 274-75 & nn. 13-16 (D.N.J. 1991) *aff'd in relevant Part*, 480 F.2d 171 (3d Cir. 1992), the district court noted that "Kramer's conduct throughout the course of this trial has led to the imposition of a restraining order, consideration of motions for a mistrial, delays resulting therefrom, and more," and ultimately concluded that "that plaintiffs' counsel deliberately set out to sabotage Armstrong's defense in every way possible, without regard to rules of conduct, rules of law, and orders and directions from this Court."

The court also noted that:

> In a further, bizarre development which just came to the Court's attention, a circumstance which might even be considered humorous if presented in isolation, the Court has learned that, since October 11, 1990, Mr. Kramer has been unauthorized to practice law in the State of New Jersey for failure to make his required contributions to the Clients' Security Fund. Considered in the context of Mr. Kramer's other conduct in connection with this case, however, both inside and outside the courtroom, this development is but further evidence of Mr. Kramer's complete disregard for rules an procedures governing the propriety and civility of an attorney's conduct. Regretfully, his transgressions of this sort have not been limited to the present matter.

Id. at 275. (citations omitted). (A-25).

(26) Again in *Lightning Lube, Inc. v. Witco Corp.*, Civ. No. 87-3243, slip op., 3-4 (D.N.J. June 10, 1991), Kramer was sanctioned, this time for writing to the Security Exchange Commision, in violation of Local Rule 36, with a prediction that Witco could suffer a $200+ million verdict.

H. Rodriguez, U.S.D.J., entered an order compelling Kramer to cease such conduct in order to "guarantee the defendant a fair trial by a panel of impartial jurors," observing that "[o]n two prior occasions Kramer was ordered by courts in this District to abide by Rule 36." Judge Rodriguez characterized Kramer's intolerable behavior as indicative of a "'settle or will tell' philosophy" through actions which "reflect an intent to threaten and coerce a settlement and to disseminate to the public the amount of damages he claims will be recovered." (A-26),

(27) In *Kingsepp v. Wesleyan University*, 142 F.R.D.597, 600, 602 (S.D.N.Y. 1992), the district court disqualified Kramer from serving as class counsel given his "documented failures to comply with . . . court orders, statutory requirements, and the Federal Rules of Civil Procedure," and his pervasive misconduct" in the case. The court stated that Kramer" is not an attorney to be entrusted to conduct the proposed litigation." (A-27).

(28) For a third time in *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992), Kramer's misconduct was at issue. In its motion for a new trial, Witco's relied upon Kramer's improper conduct. Although this Court denied Witco's motion, there was no doubt in the Court's mind that Kramer had, in fact, approached witnesses in an attempt to improperly influence their testimony. *Id.* at 1201, n. 10. (A-28).

(29) Also in *Lightning Lube, Inc. v. Witco Corp.*, 144 F.R.D. 662, 668, 671 (D.N.J. 1992), this Court was faced with

Lightning Lube's motion for attorneys' fees and costs, filed by Kramer against Witco, for its allegedly unfounded assertion of a counterclaim. This Court denied Lightning Lube's motion in light of Kramer's own "pernicious" and "egregious misconduct" at trial. (A-29).

(30) In *Schwartz v. Steven Kramer and Associates*, Civ. No. 90-4943 (E.D. Pa. Sept. 30, 1992), the district court denied Kramer's motion to dismiss his former client's malpractice action against him, finding that the complaint adequately stated a cause of action against Kramer "arising from a purported fraudulent scheme to induce plaintiffs into settling litigation." (A-30).

(31) In *Vangarelli v. Witco Corp.*, 808 F. Supp. 387, 389-90 & n. 4 (D.N.J. 1992) the district court was forced to "direct its resources to deciding . . . a motion for recusal, when even a cursory investigation of the facts would have revealed the spuriousness of the allegations." Kramer claimed that former Governor Byrne, a member of defense counsel's firm, had appointed Judge Rodriguez to a commission, when, in fact, Judge Rodriguez had been appointed by another governor. In denying the motion, Judge Rodriguez noted that "this is not the first time Mr. Kramer has alleged that I have a conflict of interest, based on patently erroneous grounds." (A-31).

(32) In *In the Matter of Steven M. Kramer*, 130 N.J. 536, 617 A.2d-663 (1993), Kramer was publicly reprimanded for "gross neglect," "failure to act with reasonable diligence,"

"failure to withdraw as counsel when discharged," and "failure to cooperate with the ethics authorities." (A-32).

(33) Again, in *Fineman v. Armstrong World Industries*, Inc., No. 84-3831, slip. op. (D.N.J. 1993), the Honorable John W. Bissell, U.S.D.J., condemned Kramer, holding that his "actions in contacting the press about a motion which was objectively baseless, before filing and service had been accomplished, on the eve of the annual meeting [of the defendant's stockholders], raises the inescapable inference that he perverted that motion to harass [the defendants and/or generate settlement leverage." Judge Bissell ordered a new trial and required co-counsel to be prepared to take over the entire case given the likelihood that during the retrial Kramer's, ("meddlesome, diversionary, malicious communications" with government and industry organizations, and his "improper remarks and attacks before the jury" would resume. (A133).

(34) In *In the Matter of Steven M. Kramer*, 193 A.D. 2d 222, 602 N.Y.S.2d 831 (N.Y.A.D. Ist Dept. 1993), Kramer was censured for "acts of professional misconduct." The New York Court of Appeals stated that he "neglected a legal matter "represent[ed] the client after he ha[d] been entrusted to him," disqualified by court order," and "fail[ed] to cooperate with the disciplinary committee." (A-35).

(35) In *Lightning Lube v. Kramer*, Civil Action No. 93-3878 JHR), which has since been settled, the Honorable Jerome B. Simandle, U.S.D.J., entered an Order to Show Cause with Temporary

Restraints against Kramer, on August 27, 1993, prohibiting him from forcing his former client, Lightning Lube, into involuntary bankruptcy. Judge Simandle's order also restrained Kramer from divulging any confidential information about his former client. (A-35).

(36) Finally, On September 10, 1993, the United States Court of Appeals for the Third Circuit affirmed this Court's decision in the matter of *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992), *aff'd* 4 F.3d 1153, 1179 n. 15 (3d Cir. 1993). In its Opinion, the Third Circuit admonished Kramer for his unethical conduct at trial, stating:

> We do not ignore the seriousness of Kramer's attempt to interfere with opposing witnesses. This conduct threatened to undermine the integrity of the trial proceedings and demonstrated a complete disregard of his obligations as an officer of the court.

Lightning Lube v. Witco, 4 F.3d at 1178. After deciding to uphold this Court's decision to deny the post-trial motion of Witco Corporation ("Witco") for a new trial on account of Kramer's improper conduct, the Third Circuit unequivocally warned Kramer that through his actions he risks having claims that he takes to court dismissed, whether there is prejudice or not, stating that:

> In these circumstances, even though we do not think Witco was prejudiced by Kramer's conduct, it might well be that we should simply dismiss this action for reasons of deterrence and punishment. . . [citations omitted]. But after most careful consideration, we have decided not to take that step because the remedy for misconduct should be decided by the district court and

> that court did not dismiss the case. The message which we do not wish to send is that misconduct which is not prejudicial may never lead to dismissal of a complaint or suppression of defenses.

Id., at 1179, n. 15,

Less than a year after the Third Circuit's warning, Kramer is before this Court to again defend against allegations that he has engaged in unethical and inappropriate conduct in this related action.

D. Sanctions necessary for Deterrence and Punishment In reviewing the factual background detailed above, Kramer's history of unethical conduct before this and other courts of law, the existing precedents and the provisions of Federal Rule of Civil Procedure 11, 28 U.S.C. Sec. 927 and the Court's inherent disciplinary authority, the Court finds that: (1) Kramer's attempts to prosecute this action against Appellate Counsel and Harvard Law School were for an improper purpose under Federal Rule of Civil Procedure 11(b) (1); (2) Kramer has argued an unmeritorious claim long after it should have been obvious that it had no support in violation of Rule 11 (b)(2) (as set forth in this Court's May 10, 1994 Opinion); (3) Kramer has demonstrated before this Court, his improper motives in implementing litigation strategies, which included, broadcasting his dispute with Tribe for no other purpose than to make good on a threat and "ruin Mr. Tribe's reputation"; (4) Kramer multiplied the proceedings in the case unreasonably and vexatiously in

violation of 28 U.S.C. Sec. 1927; and (5) his litigation Practices in this case, and in other cases, have been abusive and harassing.

Having found Kramer's conduct sanctionable, the Court must now address the issue of the appropriate sanctions under the circumstances. In fashioning the appropriate sanctions here, the Court recognizes the need for sanctions that not only punish Kramer, but deter similar conduct by him and others in the future. The Court recognizes the need to send a message that actions like those that Kramer seems disposed to take, are unacceptable in the practice of law (6)

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6. The Court is mindful of the Perceived loss of integrity in the legal profession in recent years. In his new book, *The Betrayed Profession*, Sol M. Linowitz, Esq., focuses on the decline in professionalism during the course of the past five decades in which he has been involved in the practice of law. Mr. Linowitz cites some alarming statistics: The American Bar Association's Commission on Professionalism reported in 1986 that only 6 percent of corporations rated "all or most" lawyers as deserving to be called 'professionals,' only 7 percent thought professionalism was increasing among lawyers, and 68 percent thought it was decreasing. No fewer than 55 percent of the nation's state and federal judges responded to a similar questionnaire with the view that lawyer professionalism was in decline. A 1993 poll by the National Law Journal found that almost a third of Americans thought lawyers were "less honest than most people,' Sol M. Linowitz, *The Betrayed Profession, Lawyering at the end of the Twentieth Century* 24 (1994). Mr. Linowitz asks, in the face of society's evident negative perception of the profession, Can we really live-with those numbers?" As is clear to Mr. Linowitz, and as is clear to this Court, we cannot live with these numbers. We must do all that we can to restore the country's faith in its system of justice. We must not allow justice to sink into the depths of the primitive wergeld system it is so often perceived to be.

The Court notes with dismay that Kramer's apparent approach to litigating this case and negotiating its settlement, not in the court room, but in the media, is not an isolated incident in his career, nor, by and large, in the legal profession. (7) With increased frequency practicing attorneys are utilizing the media to publicize their cases as a litigation tactic. This must stop if the integrity of the judicial. enterprise is to be preserved. Not only is it disruptive, wasteful and inherently prejudicial, but it is also a clear violation of the Rules of Professional Conduct. *See e.g.* RPC 3.6(a) and RPC 8.4.(8)

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7. See Jan Hoffnan, *May It Please the Public*, N.Y, Times, April 12, 1994, at B1, B7 (citing Bruce Cutler's defense of John Gotti (Cutler was convicted of criminal contempt); Ira D. London's defense of Joel Steinberg (Although the order was overturned, the trial court ordered London and other attorneys in the case to stop talking to reporters); Eric Nailburg's defense of Amy Fisher (Nailburg was one of several attorneys barred from speaking to the media until the statutory rape charges against Joey Buttafuoco were resolved); and William M. Kunstler's defense of Colin Ferguson (both Kunstler, as defense counsel, and this prosecution were restricted from speaking to the press about the Long Island Rail Road shootings for which Ferguson was to be tried).

8. RPC 3.6(a) provides as follows: (a) A lawyer shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. RPC 8.4 provides as follows: It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(continued...)

Kramer's actions reveal a pattern of behavior wherein he takes whatever steps are necessary to dragoon a settlement. He has threatened his adversaries with meritless harassing law suits and when those threats fail to motivate them to act in conformity with his desires, files the suits, resulting in a waste of time and resources for the parties as well as the courts. His conduct is in clear violation of RPC 7.1 and RPC3.2.(9) This kind of conduct cannot be tolerated from a practicing attorney. The Court can only conclude, based upon the record before it, that Kramer has either lost the capacity to practice law in the discerning and responsible manner required of

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8. (...continued) (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official; (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law; (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.

9. With regard to civil matters, RPC 3.1 provides as follows: A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. RPC 3.2 provides as follows; A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

practicing attorneys, or that he has purposely ignored his responsibilities as an officer of the court. In either case, sanctions are appropriate and necessary to protect the parties, the public and the judicial process.

Kramer's litigation tactics in this case and others amount to more than simply a lack of professional civility which the Seventh Circuit found so distressing in its Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit. (10) For over a decade Kramer has adopted a "Rambo"-style approach to litigation, by manipulating his clients, the courts, juries, adverse parties and attorneys. This motion for sanctions is only the most recent of a long stream of such applications to the courts.

The practice of law requires respect for, and adherence to, standards of conduct. It is compliance with those standards that serve to define what it means to be a member of a profession. It is the obligation of every attorney to ensure that the public's trust in the judicial process is maintained. It is also the obligation of every judge.

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10. The Committee stated that:

> A lack of civility can escalate clients' litigation costs while failing to advance their interests or bring them closer to their ultimate goal of ending disputes. Time expended in "Rambo"-style discovery can hinder or prevent litigation parties [sic] from getting to the heart of the important contested issues. Furthermore, with today's overcrowded dockets, judicial time is wasted resolving needless (often petty) disputes, which, in turn, deprives those litigants who are ready for trial of the opportunity for a more expeditious hearing. Everyone is harmed. (Final Report, at 6).

IV. Conclusion

In light of the Third Circuit's recent admonition, it should come as no surprise to Kramer, that, with respect to his actions in this case, for purposes of deterrence and punishment pursuant to Federal Rule of Civil Procedure 111 28 U.S.C. Sec. 1927 and the Court's inherent power, this Court will: (1) dismiss his Complaint, as an alternative grounds for dismissal, since this court already dismissed the action on the merits in its May 10, 1994 Opinion and Order; (2) refer the matter to the Chief Judge of the United States District Court for the District of New Jersey for disciplinary proceedings pursuant to Local Rule 7; (3) refer the matter to the Office of Attorney Ethics for the State of New Jersey, for disciplinary proceedings; (4) with respect to the alleged violations of 18 U.S.C. Sec. 875(d) , 876, and 1951(a), and New Jersey Code of Criminal Justice 2C:5-1 and 2:20-5 (extortion and attempted extortion), and other state and federal criminal laws, the Court will refer the matter to the U.S. Attorney for the Southern District of New York and the U.S. Attorney for the District of New Jersey, for investigation; and (5) order Kramer to pay attorneys' fees and costs to Appellate counsel in the total amount of $70,289.00 ($37,320.00 (Schorr cert., Par. 4) + $32,969.00 (Karasick Cert., Par. 6)). (11) See *Garr v.*

11. Although requested, the Court will not award attorneys fees to Tribe, Massey and Chesebro, as they were parties here and did not sign any of the submissions as attorneys of record. An award of attorneys' fees is exactly that, an award to the attorney of record in a litigation. None of the defendants qualify in this instance.

U.S. Healthcare, Inc., NO. 93-1754, slip. op. at 8 (3d Cir. April 29, 1994). An appropriate Order follows.

Dated: July 14, 1994

WILLIAM G. BASSLER, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STEVEN M. KRAMER,

Plaintiff, :

Civil Action No. 93-5361 (WGB)

v.

ORDER

LAURENCE H. TRIBE, HARVARD LAW SCHOOL, JONATHAN MASSEY, KENNETH CHESEBRO and IRA KARASICK

This matter having come before the Court by way of a motion for sanctions pursuant to Federal Rule of Civil Procedure 11, 28 U.S.C. Sec. 1927 and the Court's inherent disciplinary authority, brought on behalf of Defendants, Laurence H. Tribe, Esq., Jonathan S. Massey, Esq., and Kenneth Chesebro, Esq., (former appellate counsel for Lightning Lube, Inc. in the matter of *Lightning Lube. Inc. v. Witco Corp. et al.*, 802 F. Supp.1180 (D.N.J. 1992) *aff'd* 4 F.3d 1153 (3d Cir. 1993)), against Plaintiff, Steven M. Kramer, Esq., (former trial counsel for Lightning Lube, Inc.) for his improper and unethical conduct in this case; and

The Court having reviewed the submissions of the parties and heard the oral argument of counsel on April 25, 1994; and the court having dismissed the complaint on the merits by Order of May 10, 1996; and the Court having reserved decision on

Defendants Motion for Sanctions against Plaintiff, pending receipt of supplemental materials; and the Court having received and reviewed the supplemental materials; and For the reasons set forth in The court's opinion filed this day; and

For good cause shown;

It is on this 15th day of July, 1994 ORDERED as follows:

1. Defendants' Motion for Sanctions is hereby GRANTED;

2. The Complaint of Steven M. Kramer against the Defendants, Laurence H. Tribe, Esq.., Jonathan S. Massey, Esq., Kenneth J. Chesebro, Esq. and Harvard Law School, is hereby DISMISSED, with prejudicial for purposes of deterrence and punishment;

3. Plaintiff, Steven M. Kramer, Esq., shall pay expenses and attorney's fees incurred by Defendants due to the filing of his Complaint pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. Sec.1927, in the amount of $70,289.00 ($33,320.00 to Stearns & Weinroth and $32,969.00 to Ira Karasick,Esq);

4. This matter shall be referred to Chief Judge John F. Gerry of The United States District Court for the District of New Jersey, for appropriate disciplinary action, pursuant to Local Rule 7;

5. This matter shall be referred to the United States Attorney for the southern District of New York and the United

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1034, 1035-August Term, 1994
(Argued: February 9, 1995 Decided: June 2, 1995)
Docket Nos. 94-7437, -7481

ERWIN SUSMAN, and IRA GUILDEN, deceased, by & through Paul Guilden, his personal representative.
Plaintiffs,

NATHAN LEWIN. Esq.,
Appellant-Cross-Appellee.

-v.-

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, BANK HAPOALIM LTD., MOSES MANDELBAUM, GALIA,MAOR, ZEEV EVELES, AND JOHN DOES 1-5,
Defendants-Appellees- Cross-Appellants.

Before:

OAKES, KEARSE. and CABRANES,
Circuit Judges.

Appeal from so much of a judgment of the United States District Court for the Southern District of New York. Charles S. Haight, Jr., *Judge*, as imposed a $50,000 sanction on plaintiffs' attorney pursuant to Fed. R. Civ. P. 11 and the court's inherent power, on the ground that a purpose of filing the complaint was improper. *See* 154 F.R.D. 68 (1994). Cross-appeal for higher sanctions. Reversed on the appeal; cross-appeal dismissed.

KENNETH W. STARR, Washington, D.C.
(Alex M. Azar II. Christopher Landau. Kirkland & Ellis. Washington, D.C.; Herbert J. Miller, Jr., Miller, Cassidy, Larroca & Lewin. Washington, D.C., on the brief), for Appellant- Cross-Appellee.

JONATHAN J. LERNER, New York, New York
(Angela G. Garcia. Skadden, Arps, Slate, Meagher & Flom, New York, New York, on the brief), for Defendants-Appellees - Cross -Appellants .

KEARSE, Circuit Judge:

Nathan Lewin, Esq., an attorney for the plaintiffs herein whose complaint was dismissed on the ground of forum non conveniens, appeals from so much of a judgment of the United States District Court for the Southern District of New York, Charles S. Haight, Jr., Judge, as

imposed a $50,000 sanction against Lewin pursuant to Fed. R. Civ. P. 11 and the court's inherent power on the ground that the complaint, signed by Lewin, had been filed in part for an improper purpose. The court held that, although plaintiffs were also motivated in part by a proper purpose, the presence of an improper purpose warranted the imposition of sanctions. On appeal, Lewin contends principally (1) that the criticized purpose was not improper, and (2) that sanctions could not properly be imposed because the claims asserted in the complaint were not frivolous. Defendants cross-appeal, contending that the sanctions should have been more severe. For the reasons that follow, we agree with Lewin that the award of sanctions was an abuse of discretion. We therefore reverse the judgment and dismiss the cross-appeal.

I. BACKGROUND

For the purposes of this appeal, the events are not in dispute. The plaintiffs are Erwin Sussman and the estate of Ira Guilden (Guilden and/or the estate referred to as "Guilden"), who died in 1984. Sussman, a Swedish citizen who lives in the United States, and Guilden, a United States citizen who resided in New York, were founders, directors, and shareholders of North American Bank Ltd. ("NAB"), an Israeli bank. Defendants are the Bank of Israel ("BOI"), which insured deposits in Israeli banks, and several other Israeli entities and individuals.

A. The Collapse of NAB and the Litigation in Israel

In 1985, NAB collapsed after years by fraud, embezzlement, and mismanagement by its senior managers in Israel. BOI made payments to NAB depositors and obtained the appointment of the Official Receiver of the

State of Israel (the "Receiver") to liquidate NAB's remaining assets. In 1989, the Receiver commenced a civil action in Israel in the name of the State of Israel (the "Israeli action"), naming as defendants Sussman, Guilden, and several other officers and directors of NAB, and alleging, *inter alia*, that the NAB directors had been negligent and had breached their fiduciary duties by failing to monitor adequately the management of NAB and to ensure that NAB operated in compliance with Israeli banking regulations. The Receiver's complaint sought recovery from the defendants, jointly and severally, of more than $100 million dollars to compensate for losses allegedly incurred by BOI as a result of NAB's collapse.

Sussman and Guildan, represented by Israeli counsel raised affirmative defenses to the Receiver's claims and asserted third-party claims against BOI and two of its officials. In addition to alleging that BOI and the officials had been negligent in failing to carry out their supervisory duties with respect to NAB, the third-party claims alleged that BOI and the officials had deliberately misrepresented NAB's financial condition and concealed from NAB's non-Israeli directors certain financial transactions stemming from a 1983 banking scandal in Israel, which came to be known as the "Bank Shares Crisis" following revelations that many Israeli banks were artificially and unlawfully inflating the market prices of their respective shares. The third-party claims alleged that BOI and the Israeli Ministry of Finance (the "ministry") had sought to avert the financial collapse of NAB by extending it a secret

$10 million loan in order to allow NAB's senior managers to continue their manipulation of NAB's stock price; that the third-party-defendant officials, despite learning of the NAB managers'

improper activities, had continued to misrepresent NAB's situation to its nonresident directors and sought to prevent public disclosure of BOI's role in the NAB stock-manipulation scheme; and that NAB would not have collapsed but for the actions of BOI and the defendant officials. Sussman and Guilden sought contribution and indemnification for any amounts that they might be required to pay in the Israeli action.

B. *The Preparation and Filing of the New York Complaint*

Thereafter, Sussman and Guilden retained Lewin, a partner in the Washington, D.C. law firm of Miller, Cassidy, Larroca & Lewin, to investigate the circumstances underlying the Israeli suit and to evaluate the prospects for further litigation against BOI and other Israeli officials involved in the events at NAB. In 1991, as the Israeli action was nearing its scheduled trial date, Lewin drafted a complaint to be filed in New York (the "New York complaint"), naming as defendants BOI; the Ministry: three BOI officials, including the two named as third-party defendants in the Israeli action; and Bank Hapoalim, Ltd. ("Bank Hapoalim"), an Israeli bank with a branch office in New York.

The New York complaint substantially repeated Sussman and Guilden's assertions in the Israeli action that BOI and its officials had helped NAB managers to manipulate the price of NAB stock following the Bank Shares Crisis. It also alleged that the secrecy of the scheme was maintained by routing the Ministry's clandestine $10

million loan to NAB through Bank Hapoalim's New York office; that BOI and Ministry officials contemporaneously assured Sussman that NAB was well-managed and financially stable, thereby inducing

him not to sell his NAB shares: that BOI knew that the directorships held by NAB's foreign investors were largely honorary and that the investors were relying on BOI to monitor NAB's Israeli operations; and that Sussman and Guilden had relied on the representations of BOI and the Ministry in not taking action to protect their investments. The complaint also alleged that the filing of the Israeli action was itself part of BOI's continuing scheme to force Sussman and Guilden to bear the costs of BOI's failure to rectify the fraud and mismanagement at NAB. Sussman and Guilden sought, inter alia, damages totaling $17 million for the lost value of their investments in NAB.

Before filing the complaint, Lewin sent identical letters dated May 30, 1991 (the "May 1991 warning letter"), to several Israeli government officials, including then-Prime Minister Yitzchak Shamir, then Minister of Finance Yitzchak Moda'i, and BOI Governor Michael Bruno, warning them of Sussman and Guilden's intention to bring the present suit. and proposing settlement discussions. After describing the general nature of the charges contained in the draft complaint, the letter stated:

> This is a matter of extreme urgency because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days. The agencies of the Government of Israel that are engaged in an effort directed against our clients are also pressing a trial in the Jerusalem. District Court that is scheduled to begin shortly.

If this controversy erupts into public view with the filing of our lawsuit and the inception of the

> Israeli proceedings, it will not only result in a grave injustice to individuals who have been among Israel's most constant and generous supporters, but will seriously damage foreign investment in Israel in the future.

(May 1991 warning letter at 1.) The letter further asserted that Sussman and Guilden "were, at most, honorary directors of [NAB]" (id.), and that they had no involvement in the improper activities of NAB's managers and had "relied on [BOI] and its inspectors to supervise [NAB] and to insure that its business was run properly (id: at 2). It then concluded:

> The case now pending in Jerusalem is the culmination of years in which improprieties at North American Bank were overlooked or deliberately ignored by the Bank of Israel. It is grossly unjust for the Bank of Israel now to shift the blame for its own conduct to individuals who have always supported Israel emotionally and financially and seek to hold these foreign supporters liable, in an amount exceeding 200 million shekalim, for the losses caused by the failure of [NAB].

In addition to the loss of their investments, which amounted to millions of dollars, our clients estimate that they have been forced to spend in excess of one million dollars fighting baseless claims made in the Israeli courts. Our lawsuit in federal court in New York will seek recovery against the Ministry of Finance, the Bank of Israel and

individual government officials for these losses and for other harm caused to our clients.

Our clients have heretofore been reluctant to take the step of filing suit because a full airing of this

> outrageous conduct by the Government of Israel will surely deter many potential foreign investors who might otherwise be interested in lending financial resources to Israel. However, the enormity of this injustice and the relentless prosecution of the case in Jerusalem leaves them no option.
>
> If you believe that discussions on this subject can lead to a fruitful and mutually satisfactory resolution, I am prepared to come to Jerusalem promptly to meet with you.

(*Id.* at 2-3 (italics in original).)

In response to the letter, Amihud Ben-Porath, an Israeli attorney representing BOI, telephoned Lewin and requested a copy of the draft complaint. Lewin sent a copy with a June 3, 1991 covering letter (the "June 1991 letter") stating, "I have not, in out conversation. overstated my clients' anger at how shabbily they have been treated in Israel, and I hope you appreciate it and are able to communicate this feeling. . . . Maybe we can save both our clients much travail." Ben-Porath thereafter met with Lewin, Sussman, and Guilden in New York and talked with Lewin several times by telephone. After Ben-Porarh advised Lewin that Israeli officials were unwilling to settle the dispute and withdraw the Israeli action, Lewin filed the New York complaint on June 17, 1991.

C. The District Court Proceedings

1. The Dismissal of the New York Complaint

In lieu of an answer, BOI moved to dismiss the New York complaint on numerous substantive and procedural grounds, but principally argued the ground of forum non conveniens. In opposition to the forum non conveniens

motion, plaintiffs argued, *inter alia*, that some evidence available to them in the New York action, including Sussman's own testimony, would be unavailable in Israel. They stated that Sussman could not travel to Israel to testify without the risk of being detained there by the Israeli government; Sussman stated in an affidavit that his prior requests of defendants and other Israeli government officials for a guarantee of safe passage into and out of Israel for that purpose had been denied.

In an opinion reported at 801 F. Supp. 1068 (1992), aff'd 990 F.2d 71 (2d Cir. 1993) (per curiam), the district court dismissed on the forum non conveniens ground. While acknowledging that the forum preferences of Sussman, a United States resident, and Guilden, a deceased American citizen whose estate was being administered in New York, were entitled to some degree of deference. the court held that other factors pointed to Israel as the more appropriate forum. It noted principally that all of the claims in the New York complaint would be governed by Israeli law; that Sussman and Guilden had voluntarily elected to invest in Israel; and that parallel litigation arising out of the same alleged conduct was already proceeding there. The court rejected Sussman and Guilden's contention that their claims arose out of the alleged secret $10 million loan transmitted through Bank Hapoalim's branch in New York, concluding that the New York conduct "cannot be regarded, in the overall scheme of things, as other than peripheral" to alleged acts and omissions "occurring entirely in Israel." 801 F. Supp. at 1074. The court also rejected the contention that an Israeli

court would be predisposed against Sussman and Guilden's claims. It concluded that, in light of the complexity of the case and the interests of international comity, the claims in the New York complaint

presented "a quintessential case for application of the forum non conveniens doctrine." Id. at 1079. The court did not otherwise address the substance of Sussman and Guilden's allegations; rather, it conditionally dismissed the New York complaint "without prejudice to the merits of plaintiffs[s'] claims." Id.

The court imposed two conditions on the grant of dismissal. First, it required defendants to waive any statute-of-limitations defense under Israeli law that might have become available after the commencement of the New York action. Second, the court required the Israeli government to provide Sussman with "written assurances" that he would not be detained in Israel should he travel there for the purpose of defending the Israeli action or of asserting claims covered by the New York complaint. Id. Defendants complied with the court's conditions, and the complaint was dismissed. An appeal by Sussman and Guilden from the dismissal was rejected in a per curiam opinion. See 990 F.2d 71.

2. The Rule 11 Motion and the Sanctions Award

Following this Court's affirmance of the forum non conveniens dismissal, BOI moved in the district court for an award of sanctions pursuant to Fed. R. Civ. P. 11,18 U.S.C. § 1927 (1988), and the court's inherent power. They argued (a) that the New York lawsuit had been instituted for an "improper purpose," and (b) that the New York complaint and other papers filed by Sussman and Guilden "contained numerous arguments lacking factual and legal basis."

In an opinion reported at 154 F.R.D. 68 (1994), the district court granted the motion to the extent of imposing sanctions of $50,000 against Lewin pursuant to Rule 11 and the court's "inherent power to deal with abusive

litigation," 154 F.R.D. at 69. The court declined to rule on BOI's contention that the allegations of the complaint were unsubstantiated, notice that it "did not reach the merits in dismissing the complaint on forum non conveniens [grounds], and declin[ing] to expend more judicial rescources in exploring them now." Id. at 72 n.3. Rather, it imposed its sanctions "based solely," id., on what the court described as "the manifestly improper purpose which played a significant part in plaintiffs' motivation for filing their complaint, "*id.* at 69

In finding an improper purpose, the court quoted extensively from Lewin's May 1991 warning letter and his June 1991 letter to Ben-Porath and found that they were designed to force the withdrawal of the Israeli action by threatening the Israeli government with negative publicity that would result in "economic damage to Israel." Id. at 69. While acknowledging that Rule 11 sanctions may be imposed only for an abusive "pleading, motion, or other paper," see Fed. R. Civ. P. 11, and that prelitigation letters do not fall within the scope of the Rule, the court stated that Lewin's strategy constituted an "abuse of the litigation process," and that the letters provided "powerful evidence of the improper purpose for which th[e New York] complaint was filed." 154 F.R.D. at 69. In addition, the court found that Lewin's "prediction" of adverse publicity "came to pass with Mr. Lewin as a participant." Id. at 70. The court cited an article in the June 18, 1991 edition of the *Jerusalem Post*, quoting Lewin as saying that NAB's foreign investors " `were very badly treated by the Israeli

court system,' " id., and an October 31, 1991 New York Times article quoting Lewin as saying, " `The message is that if you lend your name to anything in Israel, you can no longer

be sure that some lawyer and court come after you with huge liabilities.' " *Id.* The district court stated that

> the filing of a complaint in a highly doubtful venue, for the express purpose of putting pressure on a foreign government to drop or compromise that government's action against the plaintiffs in the foreign nation's courts, furnishes a stark example of improper and oppressive litigation. That Proposition seems to me self-evident. I see no need to discuss the many cases cited in the voluminous briefs on this motion. The issue is intensely fact oriented.
>
> Plaintiffs protest that their purpose in filing the complaint was to secure an American forum for their fraud claims against defendants. They say the purity and fixity of their Purpose should be inferred from the vigor with which they litigated their right to do so in this Court and the Court of Appeals. I accept that Plaintiffs were also motivated by their forum preference, and that they did not go gently from it. It is commonplace, however, that the law recognizes multiple motives in human behavior. In this case plaintiffs had two motives. One was to pressure the Israeli Government to cease prosecution of the Jerusalem actions against them by threatening to file, and eventually filing, a sensational complaint against the government in New York. The other motive was to obtain American jurisdiction if the threats failed, as in fact they did. The conduct inspired by the first motive was improper.

Id. at 70-71

After noting that the decision as to where an action is to be filed is "essentially a legal decision" typically made by a plaintiff's attorney, *id.* at 71, the court

declined to sanction plaintiffs themselves and imposed the sanctions solely against Lewin. The court also indicated that the amount of the sanction was not intended to compensate defendants for the expense of defending the action in New York but rather was meant to deter similar filings.

Lewin has appealed the award of sanctions. Defendants have cross-appealed, contending that the amount of the award should have been higher.

II. DISCUSSION

On appeal, Lewin contends that the sanctions award should be overturned because (1) the goal of pressuring BOI to withdraw or settle the Israeli action was not an improper purpose, and (2) even if such a purpose were improper, the filing of a complaint that is well grounded in fact and warranted by existing law cannot, as a matter of law, furnish a valid basis for the imposition of sanctions. Defendants seek to have sanctions upheld not only on the basis adopted by the district court but also on the grounds that the claims asserted in the complaint were frivolous (see defendants' brief on appeal at 9 ("preposterous"), 29 ("plainly foredoomed"), 32 ("patently dismissible")); that the choice of New York as a forum was Likewise frivolous because it "lacked any legitimate reason," *id.* at 13 (*see also id.* as 11, 15, 17 (characterizing plaintiffs' legal arguments in favor of that forum as "tenuous," "contrived," and "farfetched")); and that the court should have awarded sanctions under 28 U.S.C. § 1927 on the

ground that the filing of the New York complaint unreasonably and vexatiously multiplied litigation. They also argue that the at award of sanctions should have been higher.

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We Review all aspects of a district court's award of sanctions under an abuse-of-discretion standard, *see, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S.384, 405(1990) (Rule 11 sanctions); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991) (inherent power); *Millex Industries Corp. v. Jacquard Lace Co.*, No. 94-7498, 1995 WL, 139895, at #3 (2d Cir. March 31, 1995) (inherent power); *Caisse Nationale de Credit Agricole-CNCA v. Valcorp, Inc.*, 28 F.3d 259, 264 (2d Cir. 1994) (Rule 11), giving recognition to the premise that "the district court is better situated than the court of appeals to marshal the Pertinent facts and apply the fact-dependent legal standard "that informs its determination as to whether sanctions are warranted, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 402. We nonetheless remain mindful that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* at 405; *see Derechin v. State University of New York,* 963 F.2d 513, 5I6 (2d Cir. 1992); *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1344 (2d Cir. 1991).

Under this standard of review, we find that the imposition of sanctions in the present case constituted an abuse of discretion. The district court erred as a matter of law (a) in concluding that it is improper for an attorney to file a nonfrivolous complaint in a new and proper forum partly as a means of enhancing his client's chances of obtaining the settlement of obtaining the settlement of

another pending action, and (b) in concluding sanctions may be imposed for the filing of a complaint that not only is not found to be frivolous but also wins for the plaintiff a measure of judicially imposed relief.

A. Rule 11 Sanctions

The pre-1993 version of Rule 11, which is applicable to the present case, provided that an attorney's signature on a "pleading, motion, or other paper" constituted a certification that

> to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

Fed. R. Civ. P. 11 (as amended through 1992). This version of the Rule, with the exception of technical changes, *see* Fed. R. Civ. P 11 Advisory Notes, was adopted in 1983. Although prior to 1983, Rule 11 contemplated the imposition of sanctions only upon a finding of bad faith, the 1983 revision of the Rule substituted an objective standard of reasonableness. *See generally Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985) ("*Eastway*") (citing Schwarzer, Sanctions Under the New Federal Rule 11-*A Closer Look*, 104 F.R.D. 181, 195 (1985) ("Schwarzer *A Closer Look*")), *cert. denied*, 484 U.S. 918 (1987). Applying the new objective standard in *Eastway*, we rejected the notion that an attorney who

signed an objectively unreasonable court paper could escape the imposition of sanctions by showing that he had a good faith subjective belief in its validity, *see* 762 F.2d at 253 (attorney's good faith cannot serve as a "safe harbor''); and in *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986) ("*Oliveri*"), *cert. denied*, 480 U.S.

918 (1987), we rejected the proposition that a court paper that was not objectively unreasonable could form the basis for the imposition of sanctions where the attorney was guilty of only a subjective violation o the Rule *see* 803 F. 2d at 1275 ("[r]emoving any subjective good faith component from rule 11 analysis"). *See also Derechin v. State University of New York*, 963 F.2d at 520 *United States v. International Brotherhood of Teamsters*. 948 F.2d at 1344; *Kamen v. American Telephone & Telegraph Co.* 791 F.2d 1006. 1012 (2d Cir. 1986). As discussed below, we conclude that the award of sanctions in the present case did not comply with the objective standard.

1. *Well Grounded in Fact and Law*

Preliminarily, we note our rejection of defendants' attempts to support the award of sanctions on the grounds that the claims asserted in the complaint and the selection of New York as a forum were frivolous. Under the objective standard, in order to warrant an award of Rule 11 sanctions on the basis that a complaint is not well grounded in fact or law. "it must be patently clear that a claim has absolutely no chance of success' " *Oliveri* 803 F.2d at 1275 (quoting *Eastway*, 762 F.2d at 254). Plainly this standard was not met with respect to the claims asserted in the New York complaint, for the district court, as described in Part I.C.2. above, declined to find that they were not well grounded. Rather, the court explicitly refused to address the merits, and dismissed "without prejudice to the merits of plaintiff[s"] claims." thereby allowing them to

be pursued in the Israeli action. Moreover, at least one of the conditions imposed by the court precedent to its actual dismissal of the complaint, *i.e.* that defendants present assurances from the appro-

priate Israeli authorities that Sussman would not be detained in Israel should he go there in connection with the Israeli action was designed specifically to enable plaintiffs' claims to be assessed on their merits. Accordingly, for purposes of Rule 11 analysis, their claims must be deemed nonfrivolous.

Nor can the award of sanctions be sustained on the ground that plaintiffs selected a forum inconvenient to defendants. To begin with, we are skeptical that the commencement of a suit in an inconvenient forum may be the basis of Rule 11 sanctions where venue was not improper. "Attorneys are not under an affirmative obligation to file an action in the most convenient forum; their only obligation is to file proper forum." *Newton v. Thomason*, 22 F.3d 1455, 1463-64 (9th Cir. 1994) (reversing order imposing sanctions "for an 'unnecessary and frivolous' choice of venue," where district court found venue tenuous but not improper). In any event, defendants' assertion that the choice of forum here was without any rational basis lacks support in the district court's findings and in the record. Though the court stated that New York was "a highly doubtful venue, " 154 F.R.D. at 70-71, it did not conclude that venue in New York was improper. Nor could it have concluded that there was no objectively reasonable basis for placing venue in New York, for plaintiffs alleged that BOI had used the New York branch of Bank Hapaolim in order to facilitate and conceal from plaintiffs BOI's improper participation in the NAB manipulations. *See* 28 U.S.C. s 1391(d), (f) (1988) (alien

may be sued in any district; foreign state may be sued in any district in which a substantial part of events giving rise to the claim occurred). While the court found the branch-bank involvement to be a tangential contact with New York, and found this

and other New York connections sufficiently outweighed by other factors to warrant the court's exercise of its discretion to dismiss for forum non conveniens, that exercise of discretion did not make venue in New York improper.

In sum, far from having found either plaintiffs claims or their choice of forum frivolous, the court exercised its properly invoked jurisdiction to grant plaintiffs relief designed to ensure their opportunity to have those claims addressed on their merits in the Israeli action. The award of sanctions here cannot be upheld on the basis that: the complaint or the choice of forum was not well grounded.

2. Improper Purpose as Sanctionable

The question remains whether the court could properly impose sanctions for the filing of a nonfrivolous complaint which resulted in the court's award of some benefits to plaintiffs, on the basis of its finding that plaintiffs also had a purpose that was not proper. This Court has not squarely addressed the question. In one case we stated that "[e]ven if there is an arguable legal and factual basis for a motion, an attorney or party violates Rule 11 by presenting that motion to the court for an improper purpose " *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 831 (2d Cir. 1992); but that statement was dictum, since we overturned the award of sanctions because the challenged motion had a reasonable legal basis and the district court had not found an improper purpose, *see id.* In a letter decision In *Knipe v. Skinner*, we expressly declined to reach

the question "of whether a complaint that is warranted by existing law may be Sanctionable if filed for the improper purpose of harassment, " because in that case the complaint both lacked a good faith basis and had been filed to harass. 19 F.3d at 77.

In the article relied on in *Eastway's* discussion of the 1983 change from a subjective to an objective standard in Rule 11 analysis, Judge Schwarter emphasized that an objective standard of analysis is required even with respect to whether a filing was made with an improper purpose. See Schwarzer, *A Closer Look*, 104 F.R.D. at 295. Thus, the court is not to "delve into the attorney's subjective intent" in filing the paper, but rather should assess such objective factors as

> whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose. Findings on these points would suffice to support an inference of an improper purpose. The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it, and any reference to the relevant criteria under the Federal Rules such as those in Rule 1 and Rule 26(b)(1).
>
> It is crucial to the effectiveness of Rule 11 that this approach be followed. Were a court to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as, generating satellite litigation, inhibiting speech and chilling advocacy. . . .

. . . If a reasonably clear legal justification can be shown for the filling of the paper in question, no improper purpose can be found and sanctions are inappropriate.

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Schwarzer, *A Closer Look*, 104 F.R.D. at 195-96 (footnote omitted).

The courts have expressed somewhat divergent views as to whether an improper purpose can warrant the imposition of sanctions for a nonfrivoious filing. *Szabo Food Services Inc. v. Canteen Corp.*. 823 F.2d 1073, (1988) 7th Cir. 1987), *cert. dismissed*. 485 U.S. 901 1988) the Seventh Circuit stated that "filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning" would be sanctionable under Rule 11. Several other circuits have distinguished between complaints and other court papers, taking the view that, whatever the analysis applicable to motions and other papers filed after the commencement of the litigation, special care must be taken to avoid penalizing the filing of a nonfrivolous complaint, for otherwise a plaintiff who has a valid claim may lose his right "to vindicate his rights in court," *National Association of Government Employees, Inc. v. National Federation of Federal Employees*, 844 F.2d 216, 224 (5th Cir. 1988); *see also Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir, 1990) (en. banc) (imposition of sanctions inappropriate for filing of a nonfrivolous complaint "even when the motives for asserting those claims are not entirely pure"); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988) (if complaint filed were not frivolous, "then any suggestion of harassment would necessarily fail").

In *Townsend v. Holman Consulting Corp.*, the Ninth Circuit's analysis was as follows:

Although the "improper purpose" and "frivolousness" inquiries are separate and distinct, they will often overlap since evidence bearing on frivolous-

> ness or non-frivolousness will often be highly probative of purpose. The standard governing both inquiries is objective. . . . . With regard to complaints which initiate actions, we have held that such complaints are not filed for an improper purpose if they are non-frivolous. . . . Since subjective evidence of the signer's purpose is to be disregarded. . . the "improper purpose" inquiry subsumes the "frivolousness" inquiry in this class of cases. The reason for the rule regarding complaints is that the complaint is, of course, the document which embodies the plaintiff's cause of action and it is the vehicle through which he enforces his substantive legal rights. Enforcement of those rights benefits not only individual plaintiffs but may benefit the public, since the bringing of meritorious lawsuits by private individuals is one way that public policies are advanced. . . . [I]t would be counterproductive to Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure.
>
> . . . [A] determination of improper purpose must be supported by a determination of frivolosness when a complaint is at issue.

Id. at 1362 (footnote omitted).

We are in agreement with the *Townsend* analysis, especially in circumstances such as those present here, where the court not only did not find the claims to be objectively unreasonable but imposed restrictions on defendants in an effort to ensure that plaintiffs would have an adequate opportunity to have their claims adjudicated on the merits. A party should not be penalized for or

deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper.

3. Whether the Criticized purpose Was Improper

Finally, we turn to the question of whether the finding that there was an improper purpose was correct. The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further unless such measures are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for, speaking to the press have serious have serious First Amendment implications. Mere warnings by a party of it's intention to assert nonfrivolous claims, with predictions of those claims' likely public reception, are not improper.

Nor do we think that it was appropriate for the district Court Lewin's prelitigation letters were evidence that the New York complaint was filed for an improper purpose. It is hardly unusual for a would be plaintiff to seek to resolve disputes without resorting to legal action; prelitigation letters airing grievances and threatening

litigation if they are not resolved are commonplace, sometimes with salutary results, and do not suffice to show an improper purpose if nonfrivolous litigation is eventually commenced. Indeed, it would be ironic to hold that Rule 11 sanctions may be awarded

based solely on evidence that the plaintiff has given the defendant a warning that the complaint will be filed unless an allegedly tortious lawsuit is withdrawn, in light of the fact that the current version of Rule 11 itself, *see* Fed. R Civ. P. 11(c)(l) (effective Dec. 1, 1993), essentially forbids the filing of a motion for sanctions unless the movant has given his opponent a warning that such a motion will be filed if the allegedly sanctionable paper is not withdrawn.

B. *Inherent Power*

A court has the inherent power to supervise and control! its own proceedings and to sanction counsel or a litigant for bad-faith conduct. *See, e.g., Chambers v. NASCO*, 501 U.S. at 43-50. While Rule 11 extends only to papers filed with the court, the court's inherent power is broader and would permit the court to impose sanctions on the basis of related bad-faith conduct prior to the commencement of the litigation, *see e.g. Chambers v. NASCO*, 501 U.S. at 36, 40-41,44. Though the imposition of sanctions for bad faith obviously entails an inquiry that is at least in part subjective, we conclude that the court's use of its inherent power in the present case constituted an abuse of discretion, for the court's expressed goal of deterrence was inappropriate with respect to a complaint whose merits were not addressed and whose filing properly led the court to grant some relief to the plaintiffs.

We note that the award of sanctions would have been no more supportable if it had been designed to

compensate defendants for attorneys' fees and other expenses. The general American rule is that a prevailing party in federal court litigation cannot recover attorney's fees, *see Alyeska Pipeline Service Co. v. Wilderness*

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Society, 421 U.S. 140, 247 (1971), and an exception for bad-faith conduct may be made only where there is " `clear evidence' that the claims `are entirely without color *and* made for reasons of harassment or delay or for other improper purposes.' " *Eastway* 762 F.2d at 253 (quoting *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977)) (emphasis in *Eastway*). Even assuming that defendants could be regarded as the prevailing parties in this controversy whose merits have nor been determined, defendants did not meet the exception to the American Rule since they did not persuade the district court that the Claims asserted in the New York complaint were with out color.

Finally, we note that though defendants sought sanctions under 28 U.S.C. § 1927 as well as under Rule 11 and the court's inherent power, arguing that the filing of the complaint had needlessly and vexatiously multiplied the litigation, the court plainly did not treat the present action as congruent with the Israeli action, for it refused to dismiss the New York action unconditionally and instead granted plaintiffs relief that they bad previously been unable to attain from defendants. In the circumstances, it cannot be concluded that the filing of the New York complaint either was in bad faith or caused "delay that was *unnecessary*" or initiated "litigation that was needless" or without "any apparent Legitimate purpose." Schwarzer, *A Closer Look*, 104 F.R.D.- at 195 (noting similarity between § 1927 and purpose element of Rule 11) (emphasis added). The court

properly denied defendants' request for an award of sanctions under § 1927.

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CONCLUSION

We have considered all of defendants' arguments in support of sanctions and have found them to be without merit. In light of our conclusion that an award of sanctions was improper on any o the bases proffered below, defendants' cross-appeal, arguing that the sanctions should have been more severe, is moot.

So much of the judgment as imposed sanctions against Lewin is reversed. The cross-appeal is dismissed.